Siti Kanta Pal and anr. Vs. Radha Gobinda Sen and ors.

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Court : Kolkata

Decided On : Dec-21-1928

Reported in : AIR1929Cal542

Appellant : Siti Kanta Pal and anr.

Respondent : Radha Gobinda Sen and ors.

Judgement :

Mallik, J.

1. These two appeals are against the same judgment. They arise out of a suit for a declaration of title and issue of a permanent injunction -- a declaration that the defendants have no right to irrigate their lands with the water of a certain tank known as Chata tank and an injunction restraining the defendants from drawing water from this tank for that purpose. There were two sets of defendants the Dubey defendants who are defendants 1 to 5 and the Pal defendants who are defendants 6 and 7. Plaintiffs' claim was resisted by the defendants on the allegation that the defendants had acquired a right of easement by prescription as also from a lost grant. The Court of first instance found that all the defendants had acquired a right of easement and on that finding dismissed the plaintiffs' suit. On appeal by the plaintiffs, the lower appellate Court modified the decision of the trial Judge and holding that while the Pal defendants had not acquired any right of easement, the Dubey defendants had acquired such a righ, decreed the plaintiffs' suit in part. Against this decision, the Pal defendant as well as the plaintiffs have appealed to this Court the Pal defendants in Appeal No. 2587 of 1926 and the plaintiffs in Appeal No. 229 of 1927.

2. It appears that the lower appellate Court found as a fact that all the defendants, the Pals and the Dubeys, had been using the water of the tank for the purpose of irrigating their lands for a very long time. But finding that this user was not peaceable from 1925 which was more than two years before the institution of the suit, the learned District Judge held that there could be no acquisition of a right of easement by prescription under Section 26, Lim. Act. Mr. Mukherji for the Pal defendants contended that the learned District Judge was wrong in holding that the user must be for 20 years, up to within two years of the suit. This contention, in my opinion, is not tenable. Para. 2, Section 26, Sub-section 1, Lim. Act, lays down that the period of 20 years required for creating a right of easement shall be taken to be a period ending within two years nest before the the institution of the suit, wherein the claim to which such period relates is contested. Mr. Mukherji in support of his contention drew our attention to the concluding portion of the para. 1, Section 26(1) where it is stated that where there is a user for 20 years, the right shall be absolute and indefeasible. But para. 1, of the Sub-section, where the absolute and indefeasible

character of the right is mentioned, seems to be clearly controlled by the provisions of para. 2 of the Sub-section because the latter does nothing but explain how the period of 20 years necessary under the para. 1, is to be computed. It has been authoritatively held that a title to easement is not complete merely upon the effluxion of the period mentioned in the Statute viz. 20 years and that however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on, must be an enjoyment for 20 years upto within 2 years of the institution of the suit. I am therefore, of opinion that the learned District Judge was perfectly right in holding, on the fact found by him, viz. that the long user had not beau peaceable from 1925, that the defendants had not acquired any right of easement by prescription under Section 26, Lim. Act.

3. The finding of the lower appellate Court that the user had not been peaceable from 1925 was also assailed before us. Whether the user had been peaceable or not is a pure question of fact and I do not think, the correctness of the finding' that it was peaceable can be questioned before us in second appeal.

4. The contention of Mr. Mukherji that the finding of the lower appellate Court that there had been user for a very long time was sufficient for an easement by prescription, is untenable on another ground. For the creation of a right of easement by prescription, there must not only be a peaceble and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right. In the present case, there is no finding that the enjoyment was of that character. It was contended on behalf of the Pal defendants that long user was sufficient for a finding of an enjoyment as of right. This is a proposition of law to which I am unable to accede. Whether an enjoyment is as of right or not, is, in my opinion, a pure question of fact -- and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

5. Mr. Mukherji next contended that the lower appellate Court should have dismissed the plaintiffs' case against the Pal defendants, when there was a finding in their favour on the question of a lost grant. But as I read his judgment, the District Judge's finding on the question of lost grant refers to the Dubey defendant only and the learned District Judge never found the point in favour of the Pal defendants as well. In view of what I have stated above, the judgment and decree of the lower appellate Court, so far as the Pal defendants are concerned, cannot, in my opinion, be successfully assailed.

6. I come now to appeal No. 229 of 1927 the appeal which the plaintiff has filed against that portion of the decree of the District Judge whereby the learned District Judge dismissed the plaintiff's case as against the Dubeys.

7. The District Judge has found that the Dubeys, although they failed to substantiate their title to an easement by prescription, succeeded in establishing it on a lost grant. Mr. Chakravarti, for the plaintiff appellant, contended that long user was, by itself, not sufficient for a finding of lost grant. That may or may not be so. But a long user was not the only evidence on the point, so far as the Dubeys were concerned. There was in their case the further fact that the land of the Dubeys as also the Chatta tank were held under the same landlords, the Bannerjees of Ajodhya. The question whether there was lost grant or not is a question of fact and the lower appellate

Court in the present case on a consideration of the fact of long user, coupled with the fact that the lands of the Dubeys and the tank are held under the same landlords came to the conclusion that so far as the Dubeys are concerned the story of a lost grant had been established.

8. In view of the aforesaid observations, both the appeals, in my opinion, must fail. They are accordingly both dismissed with costs.

Cuming, J.

9. I agree.